

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

In re: WELDING FUME PRODUCTS  
LIABILITY LITIGATION

This pleading applies to the following  
cases:

See Exhibit A To Counsel's Motion to  
Withdraw

Case No. 1:03-CV-17000

MDL Docket No. 1535

JUDGE O'MALLEY

**DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO PROSECUTE**

Pursuant to Fed. R. Civ. P. 41(b), defendants respectfully move for dismissal without prejudice of the above-captioned cases for failure to prosecute.

On March 14, 2006, the Climaco and Kaiser firms filed a motion to withdraw as counsel for 1,598 plaintiffs (originally from the multi-plaintiff *Adames* case) for failure to "participate in their lawsuit[s]." (Pls'. Mot. to Withdraw at 1.) Given that these plaintiffs' own counsel have acknowledged their lack of desire to prosecute, this Court should dismiss these cases without prejudice for want of prosecution. *See Roberts v. General Motors Corp.*, No. Civ. A. 2:04 CV 44 DF, 2005 WL 1077639 (E.D. Tex. May 6, 2005) (granting plaintiff's counsel's motion to withdraw and dismissing plaintiff's case without prejudice for failure to prosecute because plaintiff did not indicate that she

desired to move forward with her claim); *Morgan v. Washington Metropolitan Area Transit Authority*, Civ. A. No. 91-1084, 1991 WL 241901 (D.D.C. Oct. 31, 1991) (same).

In *Morgan*, the plaintiff's counsel filed a motion to withdraw because counsel was unable to contact the plaintiff, and further, because the plaintiff made no indication that he wished to move forward with his lawsuit. *Morgan*, 1991 WL 241901 at \*1. After the motion to withdraw was filed by plaintiff's counsel, the defendant filed a motion to dismiss for failure to prosecute the case. *Id.* The *Morgan* court granted both motions and dismissed the suit for want of prosecution.

Similarly, the 1,598 plaintiffs in the *Adames* case have also demonstrated a lack of desire to move forward with their case. As the Plaintiff's Motion to Withdraw as Counsel makes clear, these plaintiffs "have . . . refused or failed to participate in their lawsuit." Pl. Mot. to Withdraw at 1. Moreover, "[n]one of the plaintiffs, with the exception of a very few, have indicated any desire to continue to prosecute their claims despite several requests." *Id.* at 2.

For the foregoing reasons, defendants request that the Court dismiss the cases in Attachment A of the Motion to Withdraw. Defendants also request that the dismissal require plaintiff to refile, if at all, in federal court. *See Williams v. Laboratory Corp. of America, Inc.*, No. Civ. A. 301CV0514-R, 2001 WL 896922 (N.D. Tex. Aug. 3, 2001) (conditioning dismissal without prejudice on the requirement that any re-filing by the plaintiff be in federal court, so that the defendant "will not be faced with the expense of an additional removal petition"); *see also Bentz v. Reed Elsevier, Inc.*, No. C-3-00-350, 2000 U.S. Dist. LEXIS 20370 (S.D. Ohio Dec. 5, 2000) (conditioning dismissal on

refiling of transferred case in transferee court).

Dated: March 15, 2006

Respectfully submitted,

s/ John H. Beisner  
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